

**Before the  
Federal Communications Commission  
Washington, DC 20554**

<b>In the matter of</b>	)	
	)	
<b>NATIONWIDE PROGRAMMATIC</b>	)	<b>WT Docket No. 03-128</b>
<b>AGREEMENT REGARDING THE</b>	)	
<b>SECTION 106 NATIONAL HISTORIC</b>	)	
<b>PRESERVATION ACT REVIEW PROCESS</b>	)	
	)	
	)	

**Reply Comments  
of the  
United South and Eastern Tribes, Inc.  
And its Member Tribes:**

**Eastern Band of Cherokee, Mississippi Band of Choctaw, Miccosukee Tribe of Florida, Seminole Tribe of Florida, Chitimacha Tribe of Louisiana, Seneca Nation of Indians, Coushatta Tribe of Louisiana, St. Regis Band of Mohawk Indians, Penobscot Indian Nation, Passamaquoddy Tribe – Indian Township, Passamaquoddy Tribe – Pleasant Point, Houlton Band of Maliseet Indians, Tunica-Biloxi Indians of Louisiana, Poarch Band of Creek Indians, Narragansett Indian Tribe, Mashantucket Pequot Tribe, Wampanoag Tribe of Gay Head (Aquinnah), Alabama-Coushatta Tribe of Texas, Oneida Indian Nation, Aroostook Band of Micmac Indians, Catawba Indian Nation, Jena Band of Choctaw Indians, Mohegan Tribe of Connecticut, Cayuga Nation**

**September 8, 2003**

**Introduction.** As a general matter, USET will not repeat here comments it made in its initial filing, but shall instead confine its remarks to addressing issues not raised or fully developed in those comments but which are clearly relevant as a result of reviewing what other parties have submitted.

**Time Frames – USET supports time frames for tribal consultation that are generally consistent with the time frames provided for other parties, so long as tribes are provided with the resources to respond in a timely manner.** The most common theme found among the comments of the various communications companies with regard to tribal issues was a strong concern regarding maintaining time frames that would not unduly slow the development and construction of towers. Since USET's earliest discussions with industry representatives several years ago, we have understood the importance of this issue and been willing to agree to time frames and deadlines largely consistent with

current proposals. To be specific, USET generally supports deadlines that run in the range of 30 days, plus perhaps an extension of 30 days.<sup>1</sup>

However, such deadlines are meaningless if tribes lack the resources to respond to the hundreds and, indeed, thousands of letters they receive from cell tower companies and their contractors. Tribal historic preservation departments lack the resources even to open these letters, much less to reply and, as is generally necessary, explain that the letters provide insufficient information to enable the tribe to make a sufficient response. A typical tribe may have one official responsible for historic preservation issues. Often that official will have other duties and may have no support staff of his or her own, or may share a secretary with another tribal department. Only a small fraction of the tribes have 101(d)(2) Tribal Historic Preservation Officers, a status which modestly correlates with a more sophisticated, although likely still very small, historic preservation capability. In this real world context, the cell tower companies can comfortably state their strong respect for tribal rights while also arguing for strict time frames because they know that those rights are meaningless so long as the overwhelming majority of tribes lack the financial capability to take advantage of them.

One of the principal rationales for devolving Section 106 responsibilities to the cell tower companies is to address the practical difficulty of the FCC complying with Section 106's mandates.<sup>2</sup> Tribes have the same problem as the FCC. Only a very small number of tribes<sup>3</sup> could address the near endless flow of cell tower company notice letters. Even if a tribe has the financial capability to respond to the letters, as described

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<sup>1</sup> USET's Alternative B specifically contemplates time frames as stated in section IV.C.

<sup>2</sup> This difficulty was mentioned by two commenters who argued that USET's Alternative B, which requires the FCC to undertake its full consultation obligation unless an exception is met, is impractical. As PCIA noted in its comments, "Excessively rigid regulatory solutions that implausibly rely on requiring the Commission staff to participate personally in thousands of consultations all over the country will not facilitate better, more efficient review." Crown Castle stated that under USET's proposed Alternative B "the FCC would be required to handle all facets of communications and negotiations with tribes and NHOs for each covered Undertaking. The logistical issues associated with this option would be overwhelming. The FCC would probably have to add hundreds of staff to manage the magnitude of consultations for each undertaking with each Indian tribe or NHO." Industry's sympathy for the FCC is laudable; it should extend similar sympathy to the tribal historic preservation official who is just as overwhelmed.

<sup>3</sup> E.g., a few tribes have a strong economic base; some like the Navajo Nation have a larger historic preservation department and a reservation that covers most of its aboriginal lands; and some receive cost recovery payments from cell tower companies.

below the obligation to cover costs for securing tribal expertise should fall on the cell tower company, not on the tribe.

**Alternative B and Cost Recovery.** USET supports Alternative B because it puts tribes at the center of the process when it comes to identifying and evaluating properties of religious and cultural significance to them. Under Alternative B, a tribe could, if it chose, seek to recover its costs for processing an Applicant's request, before agreeing to issue a letter of certification. Alternative A, because it puts the Applicant at the center of the process, does not allow tribes this option for cost recovery. If there is no mechanism in place for tribes to recover their costs, they cannot respond to the overwhelming number of requests and, as far as tribal sacred sites are concerned, the whole process would be a farce.

Some Applicants may fear that they would be held hostage by tribes seeking excessive cost recovery. USET and its member tribes do not support such conduct by a tribe. To assure Applicants in this regard, USET supports a reasonableness test or the development of a cost recovery schedule that mirrors the costs of private sector entities to assure that cost recovery is fair, accurate and predictable.

USET is motivated by a desire to see this process work. Alternative A, in addition to being unlawful, will not work because it does not allow tribes to recoup the essential costs necessary to participate in the process.

**Mischaracterization of the Letters of Certification in Alternative B.** Some commenters stated that the letters of certification process proposed in Alternative B amounted to a delegation of the FCC's regulatory powers to Indian tribes. This assertion is absurd. The FCC retains all of its regulatory powers. The letter of certification is essentially a waiver by a tribe of its consultation rights such that the FCC can carry out its remaining responsibilities without further concern regarding its obligation to consult with a tribe that has provided such a letter. The FCC may still, on other bases, determine that a tower should or should not be built. Ultimate responsibility for an FCC undertaking always remains with the FCC.

**There are two distinct legal mandates at issue with regard to properties of religious and cultural importance to tribes that have been confused by some commenters.** The first mandate is the FCC's obligation under the National Historic Preservation Act to take into account the effect of a federal undertaking on properties included or eligible for inclusion in the National Register of Historic Places, including properties of cultural and religious importance to tribes. 16 U.S.C. 470f. The second mandate is the FCC's obligation to consult with tribes with regard to properties of religious and cultural importance to them. 16 U.S.C. 470a(d)(6)(B).

In order to fulfill its obligations under the first mandate, the FCC or, as the NPRM provides, an Applicant, needs to evaluate the potential impact of a telecommunications facility on properties included or eligible for inclusion in the National Register. With regard to sites of cultural and religious importance to tribes, the only entity that can provide the professional expertise necessary to properly evaluate such a site is the tribe or tribes who are connected to that site. This is, of course, because the significance of such sites is best understood in terms of the people to whom it is significant. Also, in many cases tribes possess knowledge regarding sites that is not available outside of tribal communities. An Applicant, when it evaluates a site retains many experts, including archaeological consulting firms, engineers, surveyors, lawyers, lobbyists, and environmental specialists. The Applicant does this, in part, to ensure that a facility can be constructed in compliance with the law. All of these professional consultants are paid. However, for some reason, most (but not all, as described in USET's initial comments) cell tower companies are reluctant to compensate tribes for the unique expertise that they possess. These companies cannot properly evaluate a site without that expertise, yet they reject making payments, apparently hoping that they can leverage the FCC's consultation obligation with tribes into either free information from tribes, or a pass on tribal consultation altogether.

With regard to the second mandate, USET does not believe that the FCC is obligated to compensate tribes with regard to direct government-to-government consultation.

In sum, accessing tribal expertise to benefit a commercial enterprise is a separate issue from direct government-to-government discussions between a tribe and the FCC.

**Inherently governmental functions.** One commenter has asserted that the FCC obligation to consult with tribes is not an inherently governmental function. This commenter's analysis essentially rests on a rhetorical ploy – setting up a straw man that it then attempts to knock down. In this case, the straw man is the assertion that the restriction on delegating inherent governmental functions does not apply where an agency retains final reviewing authority. This argument overlooks that there is a specific mandate in the National Historic Preservation Act to federal agencies to consult with tribes, which falls squarely within the context of a tremendous amount of law and policy that supports direct tribal-federal consultation. The US government does not delegate its diplomatic obligations to France to private parties; indeed, under the inherently governmental function doctrine and the separation of powers doctrine it cannot. Similarly, it cannot delegate its consultation obligation to Indian tribes to private parties.

**Conclusion.** USET and its member tribes are motivated in this proceeding by two things: the protection of our cultural and religious heritage and the preservation of tribal sovereignty and the Federal trust responsibility. Over the years, the United States has advocated many policies, such as “Manifest

Destiny” or the distribution of “40 Acres and a Mule” out West, which were widely lauded as beneficial to the Nation but which came at the great expense of Indian tribes. The NPRM can be beneficial to the Nation, but it should not come at the further expense of Indian tribes or a diminution of the mandates and goals of the National Historic Preservation Act.

USET and its member tribes, although not motivated by financial gain, would be foolish if we did not realize that without proper resources we cannot protect our heritage. The National Historic Preservation Act is meaningless to tribes if they lack the resources to become involved in these matters. The cell towers have and will continue to make tremendous profits for cell tower companies. This is appropriate. Communications companies have, as their principal motivation, the need to be profitable for their shareholders. However they, and not tribes, should bear the cost of developing these towers. The NPRM should provide a system whereby tribes can recover their costs, consistent with the standard costs associated with similar activities. Alternative A provides no mechanism for tribes to recover these costs. Alternative B would allow tribes to charge standard fees as part of the process for seeking a letter of certification.

We urge the FCC to focus on the reality of the situation for Indian tribes, both in terms of our resources, and in terms of where our sacred properties are located, and choose to adopt procedures that address this reality. USET has greatly appreciated the effort that the FCC has made in recent months to listen to tribal representatives on these matters. Those efforts are consistent with the FCC’s fiduciary obligations to tribes and, in conjunction with this comment process, demonstrate an understanding and a commitment to the government-to-government relationship. USET offers these comments as part of a continuing and dynamic process to achieve a truly workable programmatic agreement.